UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.

S & F MARKET STREET HEALTHCARE LLC,
A CALIFORNIA LIMITED LIABILITY COMPANY,
DOING BUSINESS AS WINDSOR CONVALESCENT
CENTER OF NORTH LONG BEACH

and Case 21-CA-39703

SEIU, UNITED LONG TERM CARE
WORKERS, LOCAL 6434

COUNSEL FOR THE ACTING GENERAL COUNSEL'S
OPPOSITION TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Section 102.24(b) of the Rules and Regulations of the National Labor Relations Board, herein called the Board, Counsel for the Acting General Counsel, herein called Acting General Counsel, files this Opposition to Respondent's Motion for Summary Judgment.

I. Procedural Background

On February 23, 2011, SEIU United Long Term Care Workers Union, Local 6434, herein called the Charging Party, filed the charge in Case 21-CA-39073 (attached as Exhibit A). On September 30, 2011, the Acting General Counsel issued a Complaint and Notice of Hearing, herein called Complaint (attached as Exhibit B). The Complaint set forth unfair labor practice allegations falling under Section 8(a)(1) and (5) of the National Labor Relations Act, herein called the Act, with respect to two units of employees, one called the "Base Unit," and the other called the "LVN

Unit." On October 26, 2011, the Acting General Counsel issued an Order Rescheduling Hearing (attached as Exhibit C), which rescheduled the hearing from November 7, 2011, to December 20, 2011, at 9:00 a.m. PST.

On November 22, 2011, the Acting General Counsel issued an amendment to complaint (attached as Exhibit D), which modified the Complaint by removing all unfair labor practice allegations specific to the LVN unit. On November 25, 2011, the Acting General Counsel received from S&F Market Street Healthcare, LLC, d/b/a Windsor Convalescent Center of North Long Beach, herein called Respondent, a Motion for Summary Judgment, herein called Respondent's Motion (attached as Exhibit E, with Respondent's exhibits omitted).

II. Respondent's Motion Should be Denied

a. Filing and Service

Respondent's Motion should be denied because it was not timely filed or properly served. Section 102.24(b) of the Board's Rules and Regulations requires that all motions for summary judgment be filed with the Board no later than 28 days prior to the hearing. Section 102.111(b) of the Boards Rules and Regulations, which defines time computations, provides, inter alia, that motions and papers must be received by the agency by the due date to be timely filed. Respondent's Motion was due to be received by the Board by no later than the official closing time of that office on November 22, 2011, unless a timely request for extension was granted. The certificate of service that accompanies Respondent's Motion provides no information as to how, when, or if the same was even filed with the Board. Moreover, it does not indicate that it was postmarked the day prior to November 22, 2011, or transmitted in a manner such that it was received by November 22, 2011, as required by Section

102.111(b). The Acting General Counsel concludes, thus, that Respondent's Motion was not timely filed with the Board and urges that it be rejected on this basis.

Additionally, Section 102.114 of the Board's Rules and Regulations requires that service of Respondent's Motion be made upon the parties in the same (or a more expeditious) manner as was utilized in filing the document with the Board. As noted above, the Acting General Counsel has no knowledge of how, or if, Respondent's Motion was filed with the Board. Respondent's Motion was received by the Acting General Counsel on November 25, 2011, after, according to the accompanying certificate of service, being sent by unidentified means to the parties on November 22, 2011, the due date. The Acting General Counsel concludes, thus, that Respondent's Motion was not properly served upon the parties and urges that it also be rejected on this basis.

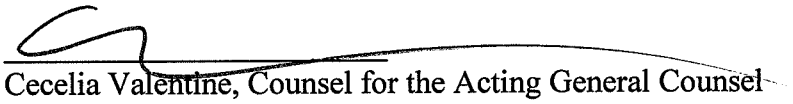
b. Mootness

In the alternative, if the Board finds that Respondent's Motion was timely filed with the Board and properly served upon the parties, the Motion should be denied on the basis of mootness. Though it is not so titled, Respondent's Motion requests partial summary judgment as to the allegations of the Complaint as they relate to the LVN unit. On November 22, 2011, however, prior to the Acting General Counsel's receipt of Respondent's Motion, as set forth in Exhibit D, the Acting General Counsel issued an Amendment to Complaint which deleted all unfair labor practice allegations specific to the LVN Unit. As the current version of the Complaint does not contain any allegations specific to the LVN Unit, Respondent's Motion should be denied on the basis of mootness.

III. Conclusion

Respondent's Motion should be denied because Respondent has failed to timely file it with the Board or to properly serve it upon the parties. Additionally, Respondent's Motion should be denied because it is moot, as the allegations as to the LVN Unit have already been deleted from the Complaint and are no longer at issue in this proceeding. The hearing date of December 20, 2011, should therefore be maintained so that the Administrative Law Judge may hear the merits of the Complaint, as amended.

Respectfully submitted,



Cecelia Valentine, Counsel for the Acting General Counsel
National Labor Relations Board, Region 21
888 South Figueroa Street, Ninth Floor
Los Angeles, CA 90017

DATED at Los Angeles, California, this 29th day of November, 2011.

STATEMENT OF SERVICE

I hereby certify that on November 29, 2011, Counsel for the Acting General Counsel's Opposition to Respondent's Motion for Summary Judgment was filed by e-filing with the National Labor Relations Board in Washington, D.C. and was served by e-mail, on the following parties:

Michael Asensio, Esq.
Baker & Hostetler, LLP
65 E. State Street, Ste 2100
Columbus, Ohio 43215
Phone: (614) 462-2622
Fax: (614) 462-2616
Email: masensio@bakerlaw.com

Catherine Sweetser, Esq
Eileen Goldsmith, Esq.
Altshuler Berzon LLP
177 Post Street, Suite 300
San Francisco, CA 94108
Phone (415) 421-7151
Fax (415) 362-8064
Email: csweetser@altber.com
egoldsmith@altber.com

SEIU, United Long Term Care Workers, Local 6434
Jimmy Valentine, Counsel
2515 Beverly Blvd.
Los Angeles, CA 90057
Phone (213) 985-1710
Fax (213) 360-0699
Email: JimmyV@seiu-ultcw.org

Cecelia Valentine, Counsel for the Acting General Counsel
National Labor Relations Board, Region 21
888 South Figueroa Street, Ninth Floor
Los Angeles, CA 90017

FORM EXEMPT UNDER 44 U S C 3512

INTERNET FORM NLRB-501 (2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE	
Case	Date Filed
21-CA-39703	2-23-11

INSTRUCTIONS:
File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1 EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer
Windsor Convalescent Center of North Long Beach

b. Tel. No. (310) 385-1022
c. Cell No.
f. Fax No. (310) 385-1015
g. e-Mail
h. Number of workers employed 115

d. Address *(Street, city, state, and ZIP code)*
260 East Market St.
Long Beach, CA 90605

e. Employer Representative
Karen Siteman
General Counsel, SNF Management
9200 Sunset Blvd., Suite 700
West Hollywood, CA 90069

i. Type of Establishment *(factory, mine, wholesaler, etc.)*
Nursing Home

j. Identify principal product or service
Long Term Care

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and *(list subsections)* 8(a)(5) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge *(set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)*
In the past six months, the Employer has refused to bargain collectively in good faith with the representatives of the employees. In particular, the Employer is engaging in surface bargaining by insisting on proposals through which the Employer would retain unilateral control over virtually all significant terms and conditions of employment and the Union would cede substantially all of its representational function.

3. Full name of party filing charge *(if labor organization, give full name, including local name and number)*
SEIU United Long Term Care Workers Local 6434

4a. Address *(Street and number, city, state, and ZIP code)*
Jimmy Valentine
SEIU ULTCW Local 6434
2515 Beverly Blvd.
Los Angeles, CA 90057

4b. Tel. No. (213) 985-1710
4c. Cell No.
4d. Fax No. (213) 360-0699
4e. e-Mail
JimmyV@seiu-ultcw.org

5. Full name of national or international labor organization of which it is an affiliate or constituent unit *(to be filled in when charge is filed by a labor organization)*
Service Employees International Union

6. DECLARATION
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By _____ Catherine Sweetser, Attorney for ULTCW
(signature of representative or person making charge) *(Print/type name and title or office, if any)*

Address Altshuler Berzon LLP, 177 Post St., Suite 300, San Francisco 2/23/11
(date)

Tel. No. (415) 421-7151
Office, if any, Cell No.
Fax No. (415) 362-8064
e-Mail
csweetser@altber.com

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

tabbies **EXHIBIT** A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 21

S & F MARKET STREET HEALTHCARE LLC,
A CALIFORNIA LIMITED LIABILITY COMPANY,
DOING BUSINESS AS WINDSOR CONVALESCENT
CENTER OF NORTH LONG BEACH

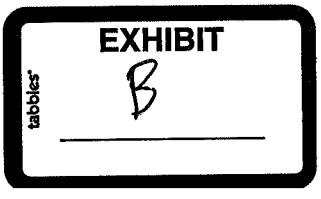
and Case 21-CA-39703

SEIU, UNITED LONG TERM CARE
WORKERS, LOCAL 6434

COMPLAINT
AND
NOTICE OF HEARING

SEIU, United Long Term Care Workers, Local 6434, formerly known as Service Employees International Union, Local 434B, AFL-CIO, CLC, and herein called the Union, has alleged that Windsor Convalescent Center of North Long Beach, herein correctly designated as S & F Market Street Healthcare, LLC, a California limited liability company, doing business as Windsor Convalescent Center of North Long Beach, and herein called Respondent, has been engaging in unfair labor practices as set forth in the National Labor Relations Act, 29 U.S.C. Sec. 151, et seq., herein called the Act. Based thereon, the Acting General Counsel, by the undersigned, pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, issues this Complaint and Notice of Hearing and alleges as follows:

1. The charge in this proceeding was filed by the Union on February 23, 2011, and a copy was served on Respondent by regular mail on February 25, 2011.



2. (a) At all relevant times, Respondent, a California limited liability corporation, has been engaged in the business of operating skilled nursing facilities, including a facility located at 260 East Market Street in Long Beach, California, herein called the North Long Beach Facility, the only facility at issue in this proceeding.

(b) During the 12-month period ending June 30, 2011, a representative period, Respondent, in conducting its operations described above in paragraph 2(a), derived gross revenues in excess of $100,000 and purchased and received at the North Long Beach facility goods valued in excess of $5,000 which originated from points located outside the state of California

3. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

4. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

5. At all material times, the Service Employees International Union, or SEIU, has been a labor organization within the meaning of Section 2(5) of the Act.

6. (a) The following employees employed by Respondent at the North Long Beach Facility, herein called the Base Unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time activities assistants employed by Respondent at its facility located at 260 East Market Street, Long Beach, California.

Excluded: All other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) The following employees employed by Respondent at the North Long Beach Facility, herein called the LVN Unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time licensed vocational nurses (charge nurses and treatment nurses) employed by Respondent at its facility located in Long Beach, California

Excluded All other employees, registered nurses, department heads, coordinators, clerical and administrative employees, guards, watchman, and supervisors as defined in the Act.

(c) On September 30, 2007, in a decision reported at 351 NLRB 975, the Board found inter alia that Respondent had violated Section 8(a)(1) and (5) of the Act since July 1, 2004 by failing and refusing to recognize and bargain in good faith with the Union as the collective-bargaining representative of its employees in the Base Unit and the LVN Unit, and the Board ordered Respondent to recognize and, an request, bargain collectively with the Union as the exclusive representative of the employees in both the Base Unit and the LVN Unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if agreements are reached embody such agreements in a signed documents.

(d) Since at least July 1, 2004, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Base Unit and the LVN Unit.

7. (a) At various times between on or about November 6, 2009, and February 7, 2011, Respondent and the Union met for purposes of collective bargaining with respect to wages, hours, and other terms and conditions of employment of the Base Unit and the LVN Unit.

(b) During the period described above in paragraph 7(a), Respondent engaged in the following conduct:

(i) unyieldingly adhering to restrictive contract proposals;

(ii) insisting on an unlawful grievance-arbitration clause which restricts employees' rights to pursue State and Federal employment claims;

(iii) insisting on a broad no-strike/no lockout provision;

(iv) insisting on a broad management rights provision;

(v) failing and refusing to make any economic proposal or counter-proposal;

(vi) failing and refusing to consider a union-security clause;

(vii) insisting on a broad discipline and discharge provision;

(viii) insisting on retaining the sole and exclusive right to unilaterally subcontract unit work;

(ix) insisting on retaining the sole and exclusive right to unilaterally change employee benefits; and

(x) failing and refusing to respond to the Union's proposals and counter-proposals.

(c) By its overall conduct, including the conduct described above in paragraph 7(b), Respondent has failed and refused to bargain in good faith with the Union as the exclusive collective-bargaining representative of the Base Unit and the LVN Unit.

8. By the conduct described above in paragraph 7, Respondent has been failing and refusing to bargain collectively with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act.

9. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

WHEREFORE, as part of the remedy for the unfair labor practices alleged above in paragraphs 7 through 9, the Acting General Counsel seeks an Order requiring that Respondent negotiate in good faith with the Union to agreement, or to impasse, for a period of no less than one year from the time that such good faith bargaining begins. The Acting General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the complaint. The answer must be received by this office on or before October 14, 2011, or postmarked on or before October 13 2011. Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically by using the E-Filing system on the Agency's website. In order to file an answer electronically, access the Agency's website at http://www.nlrb.gov, click on **E-Gov**, then click on the **E-Filing** link on the pull-down menu. Click on the "File Documents" button under "Regional, Subregional and Resident Offices" and then follow the directions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable

for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the document need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing.

Service of the answer on each of the other parties must still be accomplished in conformance with the requirements of Section 102.114 of the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT during the calendar call commencing at 1:00 p.m., PST, on the 7th day of November, 2011, a hearing will be conducted before an Administrative Law Judge of the National Labor Relations Board in Hearing Room 902, 888 South Figueroa Street, Ninth Floor, Los Angeles, California. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this complaint. The procedures to be followed at the hearing are described in the attached Form

NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338. The precise order of all cases scheduled to be heard on this calendar call will be determined no later than the close of business on the Friday preceding the calendar call.

DATED at Los Angeles, California, this 30th day of September, 2011.

D. Bruce Hill
Acting Regional Director, Region 21
National Labor Relations Board
888 South Figueroa Street, Ninth Floor
Los Angeles, CA 90017-5449

Attachments

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 21

S & F MARKET STREET HEALTHCARE LLC,
A CALIFORNIA LIMITED LIABILITY COMPANY,
DOING BUSINESS AS WINDSOR CONVALESCENT
CENTER OF NORTH LONG BEACH

and

Case 21-CA-39703

SEIU, UNITED LONG TERM CARE
WORKERS, LOCAL 6434

ORDER RESCHEDULING HEARING

At the request of counsel for the Respondent, and not opposed by any party,

IT IS HEREBY ORDERED that the hearing in the above-entitled matter be, and the same hereby is, rescheduled from November 7, 2011, to December 20, 2011, at 9 a.m., PST, at the same location.

DATED at Los Angeles, California, this 26th day of October 2011.

William M. Pate

William M. Pate, Acting Regional Director
National Labor Relations Board
Region 21
888 South Figueroa Street, Ninth Floor
Los Angeles, CA 90017-5449

EXHIBIT
tabbies
C

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 21

S & F MARKET STREET HEALTHCARE LLC,
A CALIFORNIA LIMITED LIABILITY COMPANY,
DOING BUSINESS AS WINDSOR CONVALESCENT
CENTER OF NORTH LONG BEACH

and Case 21-CA-39703

SEIU, UNITED LONG TERM CARE
WORKERS, LOCAL 6434

AMENDMENT TO COMPLAINT

A Complaint and Notice of Hearing having issued on September 30, 2011,

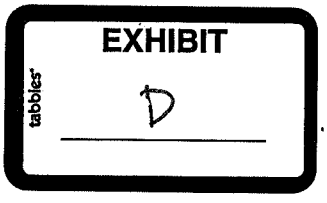
IT IS ORDERED, pursuant to Section 102.17 of the Board's Rules and Regulations that the above-referenced complaint is amended in the following respects:

(1) Paragraph 6(a) is withdrawn and is replaced with the following:

6. (a) The following employees employed by Respondent at the North Long Beach Facility, herein called the Base Unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full-time and regular part-time nurses aides, certified nurse assistants, restorative aides, orderlies, dietary employees, activity assistants and housekeeping employees employed by Respondent at its facility located at 260 East Market Street, Long Beach, California.

Excluded: All other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.



(2) Paragraph 6(b) is withdrawn.

(3) Paragraph 6(c) is withdrawn and is replaced with the following, renumbered as paragraph 6(b):

6. (b) On September 30, 2007, in a decision reported at 351 NLRB 975, the Board found, inter alia, that Respondent had violated Section 8(a)(1) and (5) of the Act since July 1, 2004, by failing and refusing to recognize and bargain in good faith with the Union as the collective-bargaining representative of its employees in the Base Unit, and the Board ordered Respondent to recognize and, upon request, bargain collectively with the Union as the exclusive representative of the employees in the Base Unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody such agreement in a signed document.

(4) Paragraph 6(d) is withdrawn and is replaced with the following, renumbered as paragraph 6(c):

6. (c) Since at least July 1, 2004, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Base Unit.

(5) Paragraph 7(a) is withdrawn and is replaced with the following:

7. (a) At various times between on or about November 6, 2009, and February 7, 2011, Respondent and the Union met for purposes of collective bargaining with respect to wages, hours, and other terms and conditions of employment of the Base Unit.

(6) Paragraph 7(c) is withdrawn and is replaced with the following:

7. (c) By its overall conduct, including the conduct described above in paragraph 7(b), Respondent has failed and refused to bargain in good faith with the Union as the exclusive collective-bargaining representative of the Base Unit.

ANSWER REQUIREMENT

Respondent is further notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the amendment to complaint. The answer must be received by this office on or before December 6, 2011, or postmarked on or before December 5, 2011. Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically by using the E-Filing system on the Agency's website. To file electronically, go to www.nlrb.gov, click on File Case Documents, enter the NLRB case number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the document need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing.

Service of the answer on each of the other parties must still be accomplished in conformance with the requirements of Section 102.114 of the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the amendment to complaint are true.

DATED at Los Angeles, California, this 22nd day of November, 2011.

William M. Pate

William M. Pate
Acting Regional Director, Region 21
National Labor Relations Board
888 South Figueroa Street, Ninth Floor
Los Angeles, CA 90017-5449

Attachments

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 21

S& F MARKET STREET HEALTHCARE LLC,
A CALIFORNIA LIMITED LIABILITY COMPANY,
DOING BUSINESS AS WINDSOR CONVALESCENT CENTER OF NORTH LONG BEACH

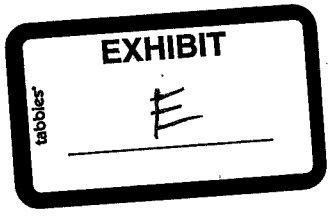
Respondent, **Case 21-CA-39703**

and

SEIU, UNITED LONG TERM CARE WORKERS, LOCAL 6434

WINDSOR CONVALESCENT CENTER OF NORTH LONG BEACH'S MOTION FOR SUMMARY JUDGMENT

Respondent Windsor Convalescent Center of North Long Beach ("Windsor") moves for summary judgment pursuant to Board Rule 102.24(b) on all allegations of unfair labor practices concerning the licensed vocational nurses unit ("LVN Unit") contained in the Regional Director's September 30, 2011 Complaint. There is no genuine issue for hearing with regard to the LVN Unit and Windsor is entitled to judgment as a matter of law. The reasons supporting this motion are set forth in detail in the attached memorandum in support.



Respectfully submitted,

M. J. Asensio
Ellen J. Shadur
Baker & Hostetler, LLP
65 East State Street, Suite 2100
Columbus, Ohio 43215
Telephone: (614) 228-1541
Facsimile: (614) 462-2616
masensio@bakerlaw.com
eshadur@bakerlaw.com

Attorneys for the Respondent Windsor Convalescent Center of North Long Beach

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 21

S& F MARKET STREET HEALTHCARE LLC,
A CALIFORNIA LIMITED LIABILITY COMPANY,
DOING BUSINESS AS WINDSOR CONVALESCENT
CENTER OF NORTH LONG BEACH

Respondent, **Case 21-CA-39703**

and

SEIU, UNITED LONG TERM CARE
WORKERS, LOCAL 6434

WINDSOR CONVALESCENT CENTER OF NORTH LONG BEACH'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

I. Introduction

On February 23, 2011, Service Employees International Union, ULTCW, Local 6434 ("Union") filed an unfair labor practices charge (the "Charge') against Windsor Convalescent Center of North Long Beach ("Windsor"). (Union Charge, attached as "Exhibit A"). The Charge alleged that Windsor engaged in surface bargaining with respect to one of two bargaining units in Windsor's facility that were represented by the Union. (*Id.*). The Region initially dismissed the Charge, but on September 30, 2011, following a successful appeal by the Union, the Region issued a Complaint with respect to not one but **both** bargaining units. (Region 21 Decision to Dismiss, attached as "Exhibit B"; Complaint, attached as "Exhibit C"). The question raised by this motion is whether the Region, should be permitted to issue a Complaint setting forth time-barred claims that were never raised by the Union and never investigated by the Region. Under well-established authority, the Region may not do so, and for the reasons set forth below, Windsor is entitled to summary judgment on the uncharged allegations contained in the

Complaint.

II. Facts

Windsor assumed control of the Convalescent Center of North Long Beach on July 1, 2004 after acquiring the facility from Candlewood Care Center ("Candlewood"). *S&F Market St. Healthcare LLC d/b/a Windsor Convalescent Ctr. of North Long Beach* and *Serv. Employees Int'l Union*, 351 NLRB No. 44, 975 (2007) (attached as "Exhibit D"). Prior to the acquisition, Candlewood and the Union were parties to a collective bargaining agreement covering all full-time and part-time nurse's aides, certified nurse assistants, restorative aides, orderlies, dietary employees, activity assistants and housekeeping employees employed at the facility ("Base Unit"). *Id.* Candlewood and the Union were also parties to a second collective bargaining agreement covering all licensed vocational nurses at the facility ("LVN Unit"). *Id.* The collective bargaining agreement between Candlewood and the Union expired 11 months before the acquisition. *Id.* at 992.

Shortly after the acquisition of the facility, the Union demanded recognition and an opportunity to meet with Windsor regarding both bargaining units. *Id.* at 997. Windsor rejected the Union's demand for recognition because it had not yet hired a representative complement of employees. *Id.* The Union responded by filing an unfair labor practice alleging that Windsor failed to bargain with the Union in good faith as required by Section 8(a)(5) of the Act. *S&F Market St. Healthcare LLC d/b/a Windsor Convalescent Ctr. of North Long Beach v. NLRB*, 570 F.3d 354, 357 (D.C. Cir. 2009) (attached as "Exhibit E"). The issue was fully litigated before an Administrative Law Judge ("ALJ"), appealed to the National Labor Relations Board ("NLRB" or "Board"), and ultimately appealed to the U.S. Court of Appeals for the D.C. Circuit. (Ex. D; Ex. E). The Circuit Court issued a judgment enforcing part of the NLRB's order and directing

Windsor to recognize and bargain with the Union. (Ex. E).

On November 6, 2009, Windsor resumed bargaining with the Union pursuant to the Circuit Court's order. (Affidavit of Joshua M. Sable, attached as "Exhibit F"). At the November 6, 2009 meeting, Windsor and the Union agreed to negotiate, separately, an agreement for the Base Unit and an agreement for the LVN Unit. (*Id.*). Over the next fifteen months Windsor and the Union met on numerous occasions to negotiate a collective bargaining agreement covering the Base Unit.[1](*Id.*). Windsor and the Union also met at various times from November of 2009 to April 16, 2010, to negotiate a collective bargaining agreement covering the LVN Unit. (*Id.*). Thereafter, the Union did not request any meetings with Windsor, and the parties did not meet because the LVNs in the unit were no longer willing to accompany the Union to the bargaining table. (*Id.*). In a final effort to keep negotiations going, on June 17, 2010, Windsor made a full written proposal to the Union regarding the LVN Unit. (*Id.*). To date, the Union has provided no formal response to these proposals, nor has the Union requested or agreed to meet with Windsor with regard to the LVN Unit. (*Id.*).

On February 23, 2011, the Union filed an unfair labor practice charge alleging that Windsor had engaged in bad-faith surface bargaining with the Base Unit. (Ex. A). Nowhere did the charge refer to the LVN Unit. (*Id.*). On March 18, 2011, the Region sent Windsor an evidence letter outlining the allegations of the Union based upon the Region's preliminary investigation of the charge. (Region 21 Evidence Letter, attached as "Exhibit G"). The letter

---

[1] Windsor and the Union met to negotiate on the following dates: Nov. 6, 2009; Dec. 22, 2009; Feb. 10, 2010; Feb. 23, 2010; Mar. 5, 2010; April 6, 2010; April 20, 2010; April 23, 2010; June 4, 2010; June 23, 2010; Oct. 19, 2010; Nov. 17, 2010; Jan. 24, 2010; Feb. 7, 2011, and March 3, 2011.

specifically stated that all of the alleged wrongful acts took place "within the past six months." (*Id.*). That is, from August 23, 2010 to the date on which the charge was filed and served, February 23, 2010.

Windsor responded to the Union's charge with a Position Statement on March 18, 2011. (Windsor Position Statement, attached as "Exhibit H"). In its Position Statement, Windsor made clear its understanding that the Union's surface bargaining charge related only to the Base Unit, not the LVN Unit. (*Id.* at p. 2 n.1). Windsor expressly stated: *"It is the Company's understanding that the allegations in the current charge do not concern the licensed vocational nursing ("LVN") unit."* (*Id.*). And, the Regional Director, in his April 28, 2011 decision dismissing the Charge against Windsor, referred only to bargaining sessions at which Windsor and the Union were negotiating a collective bargaining agreement to cover the Base Unit; no mention of any activity with respect to the LVN Unit was included in the decision. (Ex. B, p.2).

The Union filed an appeal of the dismissal in May 2011, and the Office of Appeals sustained the appeal on August 25, 2011. (Office of Appeals Decision, attached as "Exhibit I"). The Regional Director then issued a Complaint, on September 30, 2011, alleging that Windsor failed to bargain in good faith with the Union with respect to *both* the Base Unit and the LVN Unit. (Ex. C). The Complaint was Windsor's first indication that the Union's Charge allegedly encompassed the LVN Unit and not the Base Unit only. (*See generally* Ex. C). When Windsor raised the issue, the Regional Office responded by sending Windsor a post-complaint letter on October 25, 2011 requesting, for the first time, Windsor's position with respect to the allegations concerning the LVN Unit. (Region 21 Post-Complaint Letter, attached as "Exhibit J").

III. Law and Argument

Windsor is entitled to summary judgment on all of the Complaint's allegations regarding the LVN Unit for three reasons: 1) The allegations of the Complaint regarding the LVN Unit significantly exceed the scope of the Charge; 2) The allegations of the Complaint regarding the LVN Unit were never investigated by the Region and Windsor was thereby deprived of due process; 3) The allegations of the Complaint regarding the LVN Unit are untimely under Section 10(b) of the Act.

A. The Complaint Allegations Regarding The LVN Unit Exceed The Scope Of The Charge.

Windsor is entitled to summary judgment on all Complaint allegations relating to the LVN Unit because these allegations significantly exceed the scope of the Charge. Though a charge is not intended to be a detailed pleading, and a complaint may include allegations not expressly mentioned in the charge, "there are limits to which the Board may expand the scope of the litigation outside the allegations in the charge." *NLRB v. Louisiana Mfg. Co.*, 374 F.2d 696, 704-05 (8th Cir. 1967).

The Board's Rules and Regulations expressly state minimum requirements for the contents of a charge. *See* National Labor Relations Board Rules and Regulations, Sections 102.09–102.13 "Charge", 2002. Section 102.12(d) of the Board's Rules and Regulations requires that a charge contain "[a] clear and concise statement of the facts constituting the alleged unfair labor practices affecting commerce." NLRB Rules and Regulations, § 102.12(d).

In *Airborne Freight Corp.*, the ALJ invoked § 102.12(d) to strike a paragraph of the complaint alleging unlawful activity that was never charged. *Airborne Freight Corp.* and *Kevin Tanski et. al.* and *John J. Krokey* and *John Mauer et. al.*, No. 8-CA-28047, 1999 WL 33454716 (NLRB Div. of Judges Dec. 23, 1999). John Krokey filed a charge on September 29, 1997

alleging that he and "other employees" had been discriminated against due to their union membership. *Id.* The complaint, filed June 25, 1998, alleged that the employer unlawfully disciplined Wilma Conley on October 2 and October 17, 1997. *Id.* The General Counsel conceded that no charge was filed specifically asserting these allegations; they were, according to the General Council, encompassed in John Krokey's September 29, 1997 charge on behalf of himself and "other employees." *Id.* The ALJ rejected this argument and found that Krokey's charge could not be temporally "stretched" in this manner without rendering the specificity requirement of Section 102.12(d) meaningless. *Id.* [2]

Here too, the Charge cannot be "stretched" to include allegations that Windsor failed to bargain in good faith with the LVN Unit. The Charge, filed by the Union on February 23, 2011, specifically alleges that Windsor had failed to bargain collectively in good faith "[i]n the past six months." (Ex. A). Thus, for the charge to encompass unlawful surface bargaining with respect to the LVN Unit, some bargaining would have had to have taken place within the six months preceding the charge (August 23, 2010–February 23, 2011). No such bargaining occurred. The last negotiations concerning the LVN Unit took place on April 16, 2010. (Ex. F).

It is clear that, in the absence of unlawful "stretching," the temporal scope of the February 23 charge can only extend to alleged surface bargaining with respect to the Base Unit. Windsor is, therefore, entitled to summary judgment on all Complaint allegations concerning the LVN Unit.

---

[2] See also Gulf States Manufacturers, Inc. v. N.L.R.B. 579 F.2d 1298, 1303 (5th Cir. 1978) (Because section 10(b) "precludes the Board from issuing a complaint on its own initiative," the Board could not issue a complaint based on charges that had been withdrawn and thus were untimely.).

B. Windsor Was Denied Procedural Due Process When The Complaint Allegations Concerning The LVN Unit Were Not Investigated By The Regional Office Prior To The Issuance Of The Complaint.

Windsor is entitled to summary judgment on all of the Complaint allegations relating to the LVN Unit because the Regional Office failed to investigate the allegations prior to issuing the Complaint and Windsor was thereby deprived of procedural due process. NLRB rules and the procedures contained in them must comport with the due process requirements of the Fifth Amendment. *See NLRB v. Champion Laboratories, Inc.*, 99 F.3d 223, 226 (7th Cir. 1996). A failure on the part of the NLRB or its agents to properly investigate or handle a case may result in a denial of due process. *See NLRB v. West Texas Util. Co.*, 214 F.2d 732, 742 (5th Cir. 1954) (holding that the employer was denied due process due to inadequate investigation by Board agents).

The Region's failure in the present case to investigate the Complaint allegations regarding the LVN Unit prior to the issuance of the Complaint deprived Windsor of procedural due process. The evidence letter sent by the Region on March 18, 2011 made no reference to the LVN Unit, nor was there any basis for Windsor to infer that the Region was considering expanding the charge to include the LVN Unit. (Ex. G). Windsor's response to Region's evidence letter on April 8, 2011 clearly expressed Windsor's understanding that the LVN Unit was not included in the Union's charge. (Ex. H, p. 2). If the Region intended to investigate Windsor's conduct with respect to the LVN Unit, that would have been an appropriate time for the Regional Director to inform the parties. Apparently, the Regional Director did not believe it needed information regarding the LVN Unit, because his April 28, 2011 letter dismissing the charge referred to acts relevant to the Base Unit only. (Ex. B, p. 2).

Thus there can be no disputing that from the time the Charge was filed, through the initial

dismissal and the appeal, all parties clearly understood the Charge to concern the Base Unit only.

The Region's overreaching and lack of due process are highlighted by the fact that it was only *after* the Region issued the complaint and *after* Windsor raised questions about the inclusion of the LVN Unit that the Region sent Windsor a letter requesting its position on the LVN allegations. (Ex. J). The Region's back-pedaling is an inadequate substitute for timely notice and an opportunity to be heard, *i.e.*, for due process. Windsor is, accordingly, entitled to summary judgment on each of the Complaint allegations relating to the LVN Unit.

C. The Complaint Allegations Concerning the LVN Unit Are Untimely as a Matter of Law

Finally, even if the allegations concerning the LVN unit were properly included in the Complaint, Windsor is entitled to summary judgment on all such allegations because they are untimely as a matter of law. Section 10(b) of the Act provides in relevant part that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . . ." 29 U.S.C. § 160(b) (2006).

In the instant case, the charge was filed by the Union on February 23, 2011 and served on Windsor on February 25, 2011. (Ex. A). The relevant 10(b) period was, therefore, August 23, 2010 to February 23, 2011. Thus, the surface bargaining which the Complaint alleges Windsor engaged in with respect to the LVN Unit had to have occurred on or after August 25, 2010. However, Windsor and the Union did not meet to bargain with respect to the LVN Unit after April 16, 2010 because the Union stopped requesting bargaining dates. (Ex. F). It therefore defies logic to allege that Windsor engaged in surface bargaining between August 23, 2010 and February 23, 2011 when the Union did not request bargaining for the LVN Unit and no LVN Unit bargaining took place after April 16, 2011.

Finally, the uncharged allegations of surface bargaining with respect to the LVN Unit do not relate back to the date of the initial charge. The General Counsel is permitted to add complaint allegations outside of the 6-month 10(b) period, and those allegations will relate back to the date of the initial, timely charge, if they are closely related to the allegations of the timely filed charge, and are based on conduct that occurred within 6 months of the filing of that charge. *Redd-I, Inc.*, 290 NLRB 1115, 1116 (1998); *see also Columbia Portland Cement Co.*, 303 NLRB 880, 884 (1991), efd. 979 F.2d 460 (6th Cir. 1992) (same); *NLRB v. Dinion Coil Co.*, 201 F.2d 484, 491 (2d Cir. 1952) ("If a charge was filed and served within six months after the violations alleged in the charge, the complaint . . . , although filed after the six months, may allege violations not alleged in the charge if (a) they are closely related to the violations named in the charge, and (b) occurred within six months before the filing of the charge."). Here, not only do the uncharged allegations concern a separate bargaining unit, they are not based on any conduct that occurred within six months of the filing of the February 23, 2011, charge. Because no bargaining concerning the LVN Unit took place within the relevant 10(b) period, the Complaint allegations concerning the LVN Unit are time barred and Windsor is entitled to summary judgment as a matter of law.

IV. Conclusion

For the foregoing reasons, Windsor respectfully requests that summary judgment be granted in its favor.

Dated: November 22, 2011

M. J. Asensio
Ellen J. Shadur
Baker & Hostetler, LLP
65 East State Street, Suite 2100
Columbus, Ohio 43215
Telephone: (614) 228-1541
Facsimile: (614) 462-2616
masensio@bakerlaw.com
eshadur@bakerlaw.com

Attorneys for the Respondent Windsor Convalescent Center of North Long Beach

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served upon D. Bruce Hill, Acting Regional Director, Region 21, NLRB, 888 South Figueroa Street, 9th Floor, Los Angeles, California 90017 and Catherine Sweetser, Counsel for SEIU, 177 Post Street, Suite 300, San Francisco, California 94108, this 22nd day of November 2011.

M. J. Asensio